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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 3rd January 2012

No. 40—IR-ID-65/2010-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 22nd November 2011 in I. D. Case No. 43 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Ruchika Social Service Organisation, Sri Ram Nagar, Samantarapur, Bhubaneswar and its Workman Shri Binaya Kumar Suar was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 43 OF 2010

The 22nd November 2011

Present :

Shri Raghbir Dash, o.s.j.s. (Sr. Branch),
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of M/s Ruchika Social Service Organisation, Sri Ram Nagar, Samantarapur, Bhubaneswar. .. First Party—Management

And
Shri Binaya Kumar Suar, C/o Sanjukta Samantray, Plot No. 466, Nayapalli, Bhubaneswar. .. Second Party—Workman

Appearances :

Shri R. N. Rath,
Authorised Representative. .. For the First Party—Management

Shri Sushant Dash,
Authorised Representative. .. For the Second Party—Workman

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short, 'the Act') made by the Government of Odisha in the Labour & Employment Department vide their Order No. 6399—ID-65/2010-LE., Dt. 30-7-2010. The schedule of reference runs as follows :—

"Whether the action of the Management of Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Binaya Kumar Suar, Supervisor with effect from 31st July 2009 is legal and/or justified ? If not, what relief is entitled to ?"

2. In this claim statement the second party has pleaded that he had been working under the Management of Ruchika Social Services Organisation (first party) since 28-7-2002. Initially, he used to get salary @ Rs. 1,000 per month which stood revised from time to time and by the time he was retrenched he was getting salary of Rs. 1750 per month. Although the second party was designated as a Supervisor, all along he used to discharge clerical and manual work under the direct control of the Programme Manager of the first party. He was in continuous employment till 30-7-2009, when all on a sudden he was asked to hand over the charge of his post to the Programme Manager on the pretext of closure of a project. The termination of his service was not in accordance with the mandatory provisions contained in the Act. Soon after his retrenchment the management floated an advertisement in the newspaper for recruitment of new staff in place of the second party. Thus, the termination of his service is neither legal nor proper.

It is alleged that when the workers of the first party Organisation formed a Trade union and the second party became a member of that Union and got involved in the Union activities to secure better service conditions, the management being vindictive denied employment to him.

3. In the written statement the first party has contended that the Organisation is a Charitable Institution. It gets financial aid by way of donations from private persons as well as grant from State Government and Central Government to undertake Philanthropic activities. The main object of the Organisation is to render services to the destitutes dwelling in slums and bustis as well as at Railway Stations and there is no profit motive behind such activities. It provides free education to such destitute children. Therefore, the first party is not an 'industry' as defined under the Act.

It is further contended that many persons have voluntarily joined with the Organisation to render free service or to render service for small honorarium. They serve for the Organisation out of their own volition and as such there is no 'Master-Servant' relationship between such workers on one hand and the management on the other. The Organisation simply engages some stray servants

on hire for manual and technical work. So far the second party is concerned, it is specifically stated that he was engaged as a Supervisor/Cluster Resource Person/Cluster Educator on payment of honorarium. Therefore, he is not a 'workman' as defined under the Act. Further contention is that the second party's work was mostly supervisory in nature. Initially he was engaged as a Teacher in a Project called "Innovative School Project". Then he worded as a Cluster Resource Person in Alternative & Innovative Education Project under 'Sarba Sikshya Abhijan' and continued till March, 2008. Then he worked as a Cluster Educator in the Alternative School Project from September, 2008 to July, 2009. Since it was a time-bound Project the same was going to be closed from July, 2009 for which the management on 3-2-2009 issued notice to the second party and some other persons working in the Project to the effect that the Project was going to be closed with effect from July 2009. Subsequently, closure notice dated 1st June 2009 was served on the second party intimating that the Project was to be closed from 31-7-2009 and that an amount equivalent to two months honorarium was remitted to the Savings Bank Account of the second party. Thus, since the services of the workman were no more required by the Organisation the action of the management cannot be said to be either illegal or unjust.

4. Basing on the pleadings of the parties, the following issues have been settled :—

ISSUES

- (i) "Whether the action of the Management of Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Binaya Kumar Suar, Supervisor, with effect from 31st July 2009 is legal and/or justified ?
- (ii) If not, to what relief he is entitled to ?
- (iii) Whether the first party is an "Industry" ?
- (iv) Whether the second party is a "Workman" ?

5. On behalf of the second party, the disputant workman has examined himself as W.W. No. 1. Exts. 1 to 7 have been marked on behalf of the second party. The first party has examined its Project Manager as M.W. No. 1. Exts. A to U series have been marked on behalf of the management.

FINDINGS

6. *Issue No. (iii)*—The first party disclaims itself to be an 'industry' as defined under the Act on the ground that it being a Charitable Institution undertakes different activities for the upliftment of certain weaker sections of the Society without any profit motive. While dealing with the wide import of the definition of the work 'industry' in Bangalore Water Supply & Sewerage Board *Vrs. A. Rajappa*, AIR 1978 (S.C.) 548 their Lordships have observed that in any profession, Club, Educational Institution, Co-operative, Research Institute, Charitable Project and other kindred adventure where systematic activity organised by co-operation between employer and employee for the production

and/or distribution of goods and services calculated to satisfy human wants and wishes is undertaken, it comes within the definition of the terms 'industry'. It is further observed that even Charitable Projects and other kindered adventures, if they fulfil the aforesighted tests, cannot be exempted from the definition of 'industry'. In the case between Thilagavathi S. and P.O. Labour Court, Madurai, reported in 2010 (I) LLI 101 which is relied on by the second party, the society by name Madurai Children Aid Society is the second Respondent. In that case there was evidence to show that the Society was being used as an observation home for children and the Government was providing aid to the Society besides donations it used to receive from other sources. The Society was giving educational training to the children for self help jobs and the like. The management used to get the allocated works carried out as per its Rules and Regulations and in accordance with the duty hours. Its accounts were being audited every year. With such evidence available on record their Lordships have held that there were systematic activities in the Respondent-Society and there were joint efforts by the employer and employees being carried out for human necessities. Following the principles laid down in Bangalore Water Supply's Case (*supra*) their Lordships held in Thilagavathi's Case (*supra*) that it is coming within the definition of 'industry' and merely because the Society runs with the aid of the Government it will not be exempted from the definition of 'industry'.

The fact situation in the case at hand is almost akin to that in Thilagavathi's case (*supra*). The first party Organisation gets donations from private persons and also gets financial aid from the State Government as well as the Central Government for its philanthropic activities. It is claimed by the Organisation that many persons have joined with the Organisation to render free service or for small honorarium and that it also engages some stray servants on hire for manual and technical work in order to carryout its activities. M.W. No. 1 has stated in his cross-examination that the Organisation carries out different activities and executes different projects through a number of volunteers who get honorarium from the Organisation. He has further stated that the Organisation has one Educational Training Centre with two units imparting training to the street/slum children on tailoring and the dress materials stitched by the trainees in the Centre are sold to outsiders. He further admits that 'Chhatua', a food product, is prepared by the volunteers working for the Organisation and the same product is supplied for the consumption of the children of different Centres being operated by the Organisation. He further says that the Organisation has takenup different Projects and for each Project there is a Project Officer whose work is supervised by a Project Programme Manager as well as the Secretary-cum-Director of the Organisation. According to the first party, education is imparted to the destitute children in several Schools/Centres operated by the Organisation. It is on record that Teachers and Resource Persons are engaged to impart education. Thus, it is found that a systematic activity organised by co-operation between the Organisation and the so-called volunteers working for the Organisation, for the production and/or distribution of goods and services calculated to satisfy human wants and wishes exists so as to bring the Organisation within the definition of 'industry'. There may be absence of profit motive or gainful objective which is immaterial. Therefore, the Organisation of the first party comes within the definition of 'industry'.

7. *Issue No. (iv)*—In order to show that the second party is not a ‘workman’ as defined under the Act oral evidence is adduced through M.W. No. 1 who has stated in his affidavit evidence that the second party was performing his work just like a Headmaster of a School in as much as he was controlling 15 Schools which were functioning under his supervision. He has further stated that as Cluster Co-ordinator he used to monitor the work of the Teachers, sign supervisory note, maintain attendance of the Teachers and students besides maintaining other registers. He has further stated that the second party was empowered to sanction leave of the Teachers working under him. It is further stated by M.W. No.1 that he was in-charge of supervision with regard to distribution of mid-day meal to the students. It is further stated by the witness that the second party was preparing honorarium list of the Teachers and making recommendation for payment and disbursement of honorarium to them. He has further stated that the second party being a member of the Approval Committee was taking decisions in respect of the procurement of materials for the project and that he was attending various meetings organised by the funding Agencies where he used to take independent decision for and on behalf of the Society. He has further stated that the second party was taking decision on student admission issue as well as the activities which were necessary to be undertaken for smooth functioning of the Project. In the written statement the management has taken the stand that the nature of work allotted to the second party was supervisory in nature.

Though M.W. No. 1 in his oral evidence has stated so many things to show the nature of duty and the function the second party used to perform, the management has failed to adduce documentary evidence to corroborate the same. Ext. H is a copy of the Teacher’s Attendance Register. It is claimed that the second party has signed on this Register signifying checking and supervision made by him with regard to the attendance of the Teachers. Ext. K series are his applications for leave wherein he has described himself as a ‘supervisor’. Ext. T is a copy of the proceeding of Harinagar Busti Sikshya Committee. The second party has signed on it giving endorsement that he had checked the proceeding. Ext. U is a copy of the statement in respect of mid-day meal which is also found to have been checked by the second party. Relying on these documents the management wants to prove that the second party’s job was supervisory in nature. Basing on these documents it may be said that the second party as a staff of the first party got the nomenclature of ‘Alternative School Supervisor’ and that in course of his duties he used to check some Registers and Records. There is no evidence showing that the principal nature of work of the second party was supervisory. The workman in his evidence has stated that he was assigned with the duties to collect survey data and children’s data from different Centres functioning under the Organisation by personally visiting to the Centres from time to time. Further, he used to distribute nutrition, learning materials, books and stationeries to the Centres and to submit report thereof to the Programme Manager. He has denied that he had any supervisory power and/or power to sanction or recommend for leave of any subordinate staff. During cross-examination not a single question has been asked to the second party challenging the assertions made by him on the nature of work he used to perform.

The management has failed to prove that the duty of the second party involved any sort of supervision over any other staff of the Organisation. With the few documents exhibited on behalf of

the first party it cannot be said that the predominant nature of duties discharged by the second party was supervisory in nature. It is well settled that designation or nomenclature cannot form the basis to determine whether a workman is a Supervisor or not. It is the performance of duties which is to be seen. Though onus is on the management to prove that the predominant nature of duty of the second party was supervisory in nature it has failed to discharge the same. Not an iota of evidence is adduced in support of its claim that the second party used to sanction leave of the Teachers or he had the power to take decision in respect of procuring materials for the Project or he used to take independent decision for and on behalf of the Society. Taking all these into consideration, this Tribunal is of the considered view that the second party is a 'workman' as defined in the Act.

The issue is answered accordingly.

8. *Issue No. (i)*—It is admitted that with effect from the 31st July 2009 the second party was denied work. Ext. 3 reflects that since the Alternative Schools Project was going to be closed on 31-7-2009 the services of the second party was no more required by the Organisation. It further reflects that the management remitted to the account of the second party two months honorarium towards the notice period. The management does not claim that the statutory requirements as laid down under Section 25-F of the Act have been complied with. Even a perusal of Ext. 3 does not reflect that all such requirements were fulfilled. However, the management takes the plea that on closure of the Project in which the second party was engaged to work, his services were terminated. Therefore, it is to be considered as to whether this is really a case falling under Section 2 (00) (bb) of the Act.

Admittedly, no appointment order containing the terms and conditions of engagement was issued to the second party. Undisputedly he had been working with the Organisation since 28-7-2002. It is not shown by the management that the second party was employed in a particular Project. In the case of S. M. Nilajkar & others *Vrs.* Telecom District Manager, Karnataka, reported in 2003 (97) FLR 608 (S.C.), the Hon'ble Supreme Court have laid down certain criteria which are to be considered to ascertain whether a workman is engaged in a Scheme or Project and whether the termination of service of such a workman would fall within Clause (bb) of Section 2 (00) of the Act. Hon'ble Supreme Court have observed as follows :—

"The termination of service of a workman engaged in a Scheme or Project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied :

- (i) that the workman was employed in a Project or Scheme of temporary duration ;
- (ii) the employment was on a contract, and not as a Daily-Wager simpliciter which provided *inter alia* that the employment shall come to an end on the expiry of the Scheme or Project ;

- (iii) the employment came to an end simultaneously with the termination of the Scheme or Project and consistently with the terms of the contract ; and
- (iv) the workman ought to have been appraised or made aware of the above said terms by the employer at the commencement of employment."

In the case at hand it is not shown that the second party was employed on a contract on a condition that the employment should come to an end on the expiry of the Scheme or Project. It is also not proved that the second party was made aware of the said terms of employment from the very commencement of his employment. Therefore, this case does not come within Clause (bb) of Section 2 (00) of the Act. Consequently, the termination of service of the second party with effect from the 31st July 2009 is illegal.

9. *Issue No. (ii)*—It is alleged by the second party that when some of the workman including himself formed a Trade Union and made a representation to the management to enhance their salary the management became vindictive and denied employment to the second party. Ext. 5 reflects that on 12-1-2009 some of the workers submitted a representation to the management to raise their salary structure and to provide better service conditions to the employees. Ext. 6 is a representation, Dt. 4-3-2009 of the second party in which the second party made a prayer to enhance his salary. A few months thereafter the second party had been denied employment. Without any other reason the management denied employment to the second party. Therefore, the second party should be reinstated in service with full back wages.

10. In the result, the reference is answered in favour of the second party. The first party is to reinstate the second party and to pay him full back wages from the date of his termination till the date of reinstatement.

Dictated and corrected by me.

RAGHUBIR DASH

22-11-2011

Presiding Officer

Industrial Tribunal

Bhubaneswar

RAGHUBIR DASH

22-11-2011

Presiding Officer

Industrial Tribunal

Bhubaneswar

By order of the Governor

T. K. PANDA

Under-Secretary to Government